No. 15-8049

IN THE

Supreme Court of the United States

DUANE EDUARD BUCK,

Petitioner,

v.

LORIE DAVIS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF FORMER PROSECUTORS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici are former state and federal prosecutors, including former attorney generals, who were responsible for the enforcement of federal and state criminal laws. Amici represent a wide range of political affiliations and views on capital punishment. All amici agree, however, that where the State imposes a capital sentence, there is a solemn duty to ensure that the sentencing hearing is conducted in compliance with both prosecutorial ethics and all fundamental constitutional guarantees afforded to criminal defendants. As former law enforcement officials, amici have a strong interest in ensuring that no capital sentence is imposed where a failure of prosecutorial ethics has permitted a sentencing determination to be influenced by a defendant's race. Amici also believe that public faith in the independence of law enforcement requires adherence to the promises that prosecutors make to defendants. The failure to live by such promises to a capital defendant, in particular, constitutes an extraordinary departure from the ethical conduct that the public expects and deserves.

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[1] Pursuant to Supreme Court Rule 37.3(a), all parties have consented to the filing of this brief. Pursuant to Rule 37.6, amici certify that no counsel for a party authored this brief in whole or in part, and no persons other than amici *curiae* or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Prosecutors in our criminal justice system are tasked with a special obligation: prosecutors must seek justice, not just convictions, even when that duty requires foregoing or overturning a conviction in order to protect a defendant's constitutional rights. Among the most important of those rights is the constitutional assurance that no defendant's sentence will be determined based upon race. In no context is this obligation more important than in capital cases, where the state seeks to impose the ultimate penalty.

This is an extraordinary case that calls for extraordinary relief. The State of Texas learned that a particular expert witness, Dr. Walter Quijano, had offered racially-biased testimony in a number of death penalty cases. Specifically, Dr. Quijano's modus operandi was to argue that a defendant's future dangerousness could be predicted, at least in part, by the defendant's race. Upon reviewing these cases, the Attorney General of Texas at the time, John Cornyn, determined that Dr. Quijano's testimony was forbidden by the U.S. Constitution, and that no death sentence should be permitted to stand if the jury was exposed to this testimony. But when Attorney General Cornyn left office, his successor reversed course with respect to Petitioner—and Petitioner alone.

The intial decision made by Attorney General Cornyn to concede error represents the highest ideals with regard to prosecutorial ethics and demonstrates a prosecutor's most serious obligations to uphold these ethics. The decision of his successor to reverse course, on the basis of a specious

distinction, is at odds with the ideals to which prosecutors should aspire and the obligations to which a prosecutor must adhere. In short, no execution should turn upon a distinction as arbitrary as the one offered in this case.

It is true, of course, that the expert testimony at issue in this case was first introduced by the defense, but that tells only part of the story. Texas ignores that following Dr. Quijano's direct examination, the prosecutor compounded defense counsel's error by eliciting additional testimony from Dr. Quijano that Petitioner's race made him more dangerous. The prosecutor then returned to that testimony, and expanded the constitutional error, in her closing argument. And even that fact fails to distinguish Petitioner's case from others that have been reversed.

Our Constitution, as well as the integrity of our criminal justice system, requires more from our prosecutors than Respondents have offered here. This case is indeed extraordinary, and further judicial review is warranted. This Court should find that the Fifth Circuit erred in denying Petitioner a certificate of appealability.

ARGUMENT

I. IN CONCEDING ERROR, ATTORNEY GENERAL CORNYN APPROPRIATELY DISCHARGED HIS DUTY TO REMEDY UNCONSTITUTIONAL PROSECUTORIAL CONDUCT

Attorney General Cornyn correctly concluded that Petitioner's sentence of death could not be permitted to stand given that it was indisputably based, at least in part, on improper testimony that

Petitioner would be more dangerous in the future because he was black. The decision to acknowledge this error was in the best and most important traditions of law enforcement. It was, moreover, consistent with the Attorney General's duty to remedy a plain violation of a defendant's constitutional rights.

A. The Prosecutor in Petitioner's Sentencing Hearing Improperly Elicited Testimony that Petitioner Was More Likely to Re-Offend Because of His Race

Prosecutors must eschew racist testimony, not elicit it. Respondents apparently agree, arguing that "it is always inappropriate for the State to ask jurors to consider a defendant's race when assessing guilt or imposing punishment, but in Buck's case that is not what happened." Br. for Resp't in Opp'n to Pet. for a Writ of Cert. at ii, *Buck v. Stephens*, No. 15-8049 (Mar. 21, 2016). That sentence's first declaration is correct, but its conclusion is not. The record below demonstrates that the prosecutor, having just witnessed the expert witness' improper testimony using race to forecast future dangerousness, returned to that testimony and highlighted the expert's constitutionally-impermissible opinion.

The issue of race initially arose in Petitioner's case when Dr. Quijano testified, as a witness for the defense on direct examination, that Petitioner's race increased the probability that he would be dangerous in the future. Although race cannot be considered as an aggravating factor at capital sentencing, *e.g.*, *Zant v. Stephens*, 462 U.S. 862, 885 (1983), Dr. Quijano's opinion urged the jurors to do

just that. Dr. Quijano's opinion apparently stemmed from his view that African Americans are "over represented in the Criminal Justice System. Tr. of Sentencing Hr'g ("Tr.") at 111:1-4, May 6, 1997, *Buck*, No. 4:04-cv-03965 (S.D. Tex. June 24, 2005), ECF No. 5-114. Dr. Quijano's Expert Report, which was submitted as a defense exhibit, stated in unequivocal terms: "Race. Black. Increased Probability [of future dangerousness]." Forensic Psychological Evaluation at 7, *Buck v. Stephens*, No. 4:04-cv-0396565 (S.D. Tex. June 24, 2005), ECF No. 5-118, p. 24.

The constitutionally deficient portion of Dr. Quijano's testimony did not stop at his direct examination because the prosecutor compounded the error on cross-examination. Specifically, the prosecutor returned to and highlighted Dr. Quijano's racially-charged testimony by asking: "You have determined that . . . the race factor, black, increases the future dangerousness for various complicated reasons; is that correct?" Tr. at 160:8-15, ECF No. 5-115, p. 17 Dr. Quijano responded: "Yes." *Id.* Having read Dr. Quijano's expert report, and having just heard Dr. Quijano's testimony on direct examination, the prosecutor knew that Dr. Quijano would reply in the affirmative. Thus, notwithstanding that defense counsel first introduced the offensive testimony, it is not seriously in dispute that the prosecutor intentionally elicited testimony from the same expert that Petitioner's race made him more dangerous.

The prosecutor made matters worse in her closing argument. There, the prosecutor unequivocally endorsed the offensive testimony by urging the jury to rely upon Dr. Quijano's testimony

when determining if Petitioner was likely to commit a violent offense in the future. Tr. at 260:13-21, ECF No. 5-117 ("You heard from Dr. Quijano, who had a lot of experience in the Texas Department of Corrections, who told you that there was a probability that the man would commit future acts of violence."). In order to issue a judgment imposing the death penalty, the jury was required to agree unanimously that Petitioner was dangerous as a result of his propensity to commit violent acts. *See* Tex. Code Crim. Proc. Ann. art. 37.071, § 2 (West 1981 and Supp. 1993). By referencing Dr. Quijano's testimony in her closing, the prosecutor encouraged the jury to consider Petitioner's race when evaluating dangerousness, and consequently ensured that racist assumptions regarding dangerousness were before the jury as it proceeded to deliberate.

Injecting racial bias into a criminal trial offends the constitutional constraints that limit the exercise of prosecutorial discretion. Such constraints include the "equal protection component of the Due Process Clause of the Fifth Amendment," which precludes a prosecutor from making enforcement decisions based upon "an unjustifiable standard such as race, religion, or other arbitrary classification." *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *cf. Rose v. Mitchell*, 443 U.S. 545, 563 (1979) ("The claim that the court has discriminated on the basis of race in a given case brings the integrity of the judicial system into direct question."); *id.* at 555 ("Discrimination on the basis of race, odious in all respects, is especially pernicious in the administration of justice."). This kind of testimony deprives the defendant of his fundamental right to a

fair trial, i.e., one in which the "jury consider[s] only relevant and competent evidence," *Bruton v. United States*, 391 U.S. 123, 131 n.6 (1968), "free from ethnic, racial, or political prejudice, or predisposition about the defendant's culpability," *Powers v. Ohio*, 499 U.S. 400, 411 (1991) (citations omitted).

Strict adherence to prosecutorial ethics is important in every case, but even more so in capital cases. The death penalty, of course, is the most grave sanction our justice system recognizes. The severity and permanence of the sanction imposes special obligations upon those who participate in its administration to ensure that the jury exercises its discretion in an appropriate manner. *See Turner v. Murray*, 476 U.S. 28, 35 (1986) (plurality opinion) ("Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected."). Among those obligations are the requirements to seek application of the penalty with impartiality, integrity, and objectivity, all of which forbid reliance on racial bias or prejudice. *See, e.g., United States v. Webster*, 162 F.3d 308, 356 (5th Cir. 1998) (recognizing that "a long line of Supreme Court precedent admonishes that the guillotine must be as colorblind as is the Constitution") (citations omitted). This is particularly so when future dangerousness is at issue: "Fear of blacks, which could easily be stirred up by the violent facts of [a] crime, might incline a juror to favor the death penalty." *Murray*, 476 U.S. at 35.

Encouraging testimony like Dr. Quijano's violates the National Prosecution Standards published by the National District Attorneys

Association, which are "intended to be guides for prosecutors" in the "day-to-day performance of the prosecution function." National District Att'ys Assn., National Prosecution Standards with Revised Commentary at 1 (3d ed. 2009) ("NPS"). This Court has recognized the authoritative role the National Prosecution Standards possess and has relied upon them to determine what public acts are an "integral part of a prosecutor's job." *Buckley v. Fitzsimmons*, 509 U.S. 259, 278 (1993). Under those standards, the prosecutor's "Primary Responsibility" is to serve as an "independent administrator of justice" and "to seek justice, which can only be achieved by the representation and presentation of the truth." NPS 1-1.1.[2] Prosecutors must uphold their "special duty to seek justice, not merely to convict." *Connick v. Thompson*, 563 U.S. 51, 65–66 (2011) (internal quotation marks and citation omitted).

Prosecutors are obligated to keep discrimination out of criminal prosecutions, from investigation through trial and appeal. The National Prosecution Standards require that a "criminal investigation should not begin or be continued if it is motivated in whole or part" by the "perpetrator's race, ethnicity, religion, sexual orientation, or political affiliation . . . ." NPS 3-1.2.[3] These duties do not disappear once

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[2] These National Prosection Standards are substantially similar to the National Prosecution Standards in effect during the Petitioner's sentencing hearing in 1997. *See* National District Att'ys Assn., National Prosecution Standards R. 1.1 (2d ed. 1991) ("The Primary responsibility of prosecution is to see that justice is done.") (hereinafter "1991 NPS").

[3] This Standard is substantially similar to several of the rules in existence under the prior edition of the National Prosecution Standards. *See* 1991 NPS, R. 42.1 ("The decision to initiate or

trial begins. As this Court has explained, the ethical obligations that attach to a decision to indict a case apply with equal force to the prosecutor's conduct at both trial and sentencing. *See Imbler v. Pachtman*, 424 U.S. 409, 424 (1976) ("A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court.").

The fact that Petitioner's counsel first introduced the constitutionally suspect testimony does not excuse the prosecutor's conduct. A prosecutor cannot "ask a question that implies the existence of a factual predicate that the prosecutor either knows to be untrue or has no reasonable objective basis for believing is true." NPS 6-6.2.[4] Further, in "closing argument, a prosecutor should be fair and accurate in the discussion of the law, the facts, and the reasonable inferences that may be drawn from the

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pursue criminal charges should be within the discretion of the prosecutor."); *id.* at 42.4 ("Factors which should not be considered in this decision include: d. Factors of the accused legally recognized to be deemed invidious discrimination insofar as those factors are nor pertinent to the elements of the crime.").

[4] *See also* 1991 NPS, R. 77.2 ("Counsel should not ask a question which implies the existence of a factual predicate which he knows to be untrue or has no reasonable objective basis for believing is true."); *id.* R. 77.5 ("The purpose of cross-examination is a good faith quest for the ascertainment of truth and should be conducted pursuant to this purpose."); *id.* R. 77 cmt. ("The prosecuting attorney, in his examination of witnesses on both direct and cross, should be guided by conduct that is not inconsistent with a good faith quest for the ascertainment of the truth. Prejudicial error, bred by improper examination tactics, might result in an undesirable conclusion of a criminal trial. The interrogation of all witnesses should be conducted fairly ").

facts." *Id.* 6-8.1.[5] The same standards impose a duty to respond to misconduct, providing that a "prosecutor is obligated to respond to professional misconduct that has, will, or has the potential to interfere with the proper administration of justice[.]" *Id.* 1-1.6.[6] The prosecutor's duty to seek justice, in short, precludes efforts to amplify or highlight impermissible testimony or arguments such as Dr. Quijano's improper testimony.

The prosecutor in this matter failed to live up to professional standards. If the prosecutor understood the impropriety and falsity of the notion that Petitioner's race was probative of his likelihood of reoffending, yet advanced that argument nonetheless, then the prosecutor improperly advanced a factual predicate that she knew "to be untrue." *Id.* 6-6.2. Conversely, if the prosecutor actually believed that Petitioner's race could, in fact, impact his likelihood of reoffending, then the prosecutor allowed her racial bias to infect the proceedings in violation of multiple standards, including National Prosecution Standard 3-1.2. In sum, whether the prosecutor subscribed to the veracity of Dr. Quijano's testimony or not, the

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[5] *See also* 1991 NPS, R. 85.1 ("Closing arguments should be characterized by fairness, accuracy, rationality, and a reliance upon the evidence or reasonable inferences drawn therefrom.").

[6] *See also* 1991 NPS, R. 25.5 ("When a prosecutor has reasonable suspicion of misconduct by defense counsel, the prosecutor has a responsibility to take such action necessary to substantiate or dispel such suspicion."); *id.* R. 25.6 ("When a prosecutor has knowledge of misconduct by defense counsel, the prosecutor has the responsibility to report that knowledge to the appropriate authority and take such other actions necessary to sanction the misconduct.").

decision to reference and underscore it violated the "special duty of the prosecutor to seek justice." *Connick*, 563 U.S. at 65.

Prosecutors are held to especially high standards in the sentencing process. During sentencing, a prosecutor "should seek to assure that a fair and fully informed judgment is made and that unfair sentences and unfair sentence disparities are avoided." NPS 7-1.1.[7] In questioning Dr. Quijano and in arguing to the jury that it should rely on his testimony, the prosecutor baited the jury into imposing its sentence based upon racial bias, which plainly violated that duty.

In sum, the prosecutor's decision to elicit racially-biased testimony in an effort to justify the imposition of the death penalty in Petitioner's case is incompatible with the expectations placed upon prosecutors, as well as fundamental conceptions of due process and individualized justice.

B. Attorney General Cornyn Appropriately Decided to Concede Error in Petitioner's Sentencing Hearing

Attorney General Cornyn first became aware of Dr. Quijano's racially biased testimony when a Petition for Certiorari was filed in *Saldaño v. Texas*, 530 U.S. 1212 (2000). *See* Press Release, Office of the Tex. Att'y Gen., Statement from Attorney General John Cornyn Regarding Death Penalty Cases, Office of the Attorney General News Release (June 9, 2000), *available at*

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[7] *See also* 1991 NPS, R. 88.4 ("To the extent that the prosecution becomes involved in the sentencing process, it should seek to assure that a fair and informed judgment is made and that unfair sentence disparities are avoided.")

https://texasattorneygeneral.gov/newspubs/newsarchive/2000/20000609death.htm (last visited Aug. 2, 2016) ("June 9 Statement") (noting that the Attorney General's Office had "identified problems associated with the testimony of Dr. Walter Quijano"). In his press release, Attorney General Cornyn stressed that "it is inappropriate to allow race to be considered as a factor in our criminal justice system." *Id.*

Commenting on the testimony in *Saldaño*, which was substantively indistinguishable from the challenged testimony at issue here, Attorney General Cornyn observed that the "evidence of the defendant's race . . . introduced before the jury by a district attorney as a factor for the jury to weigh in making its determination . . . violated Mr. Saldaño's constitutional right to be sentenced without regard to the color of his skin." Press Release, Office of the Tex. Att'y Gen., U.S. Supreme Court Grants State's Motion in Capital Case (June 5, 2000), *available at* https://texasattorneygeneral.gov/newspubs/newsarchive/2000/20000605saldanostatement.htm (last visted Aug. 2, 2016). Attorney General Cornyn concluded by vowing to the people of Texas to "continue to do everything I can to assure Texans of our commitment to an equitable criminal justice system." June 9 Statement, *supra*. Following his statement, Attorney General Cornyn conceded constitutional error in the State's brief responding to Saldaño's Petition for Certiorari, noting that "[d]iscriminaion on the basis of race, odious in all aspects, is especially pernicious in the administration of justice," because "the infusion of race as a factor for the jury to weigh in making its determination violated [Mr. Saldaño's]

constitutional right to be sentenced without regard to the color of his skin." Resp. to Pet. for Cert. at 7-8, No. 99–8119, *Saldaño v. Texas*, 530 U.S. 1212 (2000).

Attorney General Cornyn's discovery that sentencing hearings besides Saldaño's may have been tainted with racial bias triggered an obligation to investigate to ensure that no pending sentence had derived from constitutionally suspect sentencing hearings. As discussed *supra*, prosecutors must "respond to professional misconduct that has, will, or has the potential to interfere with the proper administration of justice." National Prosecution Standard 1-1.6.

Attorney General Cornyn thus undertook a "thorough audit" of the relevant cases and identified six cases in which constitutional violations occurred. June 9 Statement, *supra*. He sent letters to the parties in those six cases "advising them of" his findings. *Id.* One of those six was Petitioner's case. Press Release, Office of the Tex. Att'y Gen. (June 9, 2000), *available at* https://texasattorneygeneral.gov/newspubs/newsarchive/2000/20000609saldanocases.htm (last visited Aug. 2, 2016) The Attorney General's Office advised counsel for these six defendants, including Petitioner's counsel, that his office would not object if these defendants sought to overturn the death sentences and seek a new sentencing hearing based on the constitutional violations created by Dr. Quijano's testimony. *See* Jim Yardley, *Racial Bias Found in Six More Capital Cases*, N.Y. TIMES (June 11, 2000), http://www.nytimes.com/2000/06/11/us/racial-bias-found-in-six-more-capital-cases.html (last visited Aug. 2, 2016). To ensure consistency in

the application of justice, Attorney General Cornyn also requested that local prosecutors review their cases, which had not yet reached the Attorney General's office, to ensure that none of these cases were constitutionally improper. *See* June 9 Statement, *supra*.

Texas' decision to backtrack on Attorney General Cornyn's promise is extraordinary. Life or death decisions regarding the administration of a state's criminal justice system should be made with transparency, sobriety, and clarity, and they should endeavor to offer finality to both defendants and victims alike. Attorney General Cornyn's decision to take corrective action was mandated by the need to ensure the consistent administration of justice, given Texas' decision to offer relief to every other similarly-situated prisoner. The decision was also compelled by the duties of the Attorney General's office, the oath Cornyn took upon assuming duty, and the integrity the citizens of Texas expect from their public officials. To backtrack on an ethical obligation and decision to grant relief to a defendant in any context is extraordinary; it is particularly so here, where the purpose of backtracking was to defend the propriety of a capital sentencing hearing tainted by racist testimony.

II. TEXAS' DECISION TO RENEGE ON ITS PROMISE NOT TO OPPOSE PETITIONER'S REQUEST FOR A NEW SENTENCE UNDERMINES THE INTEGRITY OF THE JUDICIAL SYSTEM

The public has a need and a right to expect that the promises made by a state's highest-ranking law enforcement officials will be followed and faithfully

implemented. The opposite happened here. As discussed *supra*, following Attorney General Cornyn's public confession of error in Petitioner's case, the new Attorney General of Texas reversed the position and challenged the very petition that his predecessor invited Petitioner to file. *See, e.g.*, Opp'n to Appl. for Certificate of Appealability, No. 06-70035, *Buck v. Thaler*, 345 F. App'x 923 (5th Cir. 2009), ECF No. 005195633.[8] In doing so, he made a specious argument to distinguish the circumstances of Petitioner's case. *Id.* at 16.

Respondent's decision to break Texas' promise to Petitioner is extraordinary, and demands correction, for three reasons. First, Texas' backtracking deviates from the primary responsibility of all prosecutors to seek justice, and to faithfully adhere to the U.S. Constitution. Second, the justice system as a whole suffers when a prosecutor makes a promise to a defendant to excercise prosecutorial discretion in order to comply with its ethical obligations and duties, but then breaks that promise. Third, Texas' decision was arbitrary and has resulted in an uneven application of the law.

A. The Decision to Reverse Attorney General Cornyn's Promise is Inconsistent with Prosecutorial Ethics

While serving as Attorney General of the United States, Justice Jackson famously observed that prosecutors' offices "are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just. Although the government technically loses its case, it has really won if justice has been done."

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[8] Hereinafter "Appealability Opp'n."

Robert H. Jackson, U.S. Att'y Gen., The Federal Prosecutor, Address at the Second Annual Conference of United States Attorneys (Apr. 1, 1940) ("Jackson Address") Justice Jackson's words reflect the immense power and consequent potential for abuse that prosecutors wield in the American justice system. Prosecutors must not simply seek convictions—they are obliged to seek justice and protect the fairness of judicial proceedings. *See United States v. Williams*, 504 U.S. 36, 62 (1992) (Stevens, J., dissenting) (noting a "prosecutor's duty to protect the fundamental fairness of judicial proceedings"); *see also* 1991 NPS, R. 25 cmt. (2d ed. 1991) ("It has long been recognized that the responsibility of the prosecutor goes beyond simply seeking indictment and conviction. The duty of the prosecutor is to seek justice, not merely to obtain a conviction.") Like all other prosecutors in Texas, the Attorney General has the duty to "assure that a fair and fully informed judgment is made and that unfair sentences and unfair sentence disparities are avoided." NPS 7-1.1.

The decision to reverse Attorney General Cornyn's promise was premised entirely on the notion that Petitioner's case was distinguishable from *Saldaño* and others "because Buck himself—not the State—offered Dr. Quijano's testimony into evidence." Appealability Opp'n at 16. That argument is both unsound and unprincipled. First, the argument ignores that the prosecution elicited the very same improper testimony on cross-examination and then urged the jury to rely on the expert's testimony in closing. It was improper for the Attorney General to advance an argument so plainly at odds with the record in an effort to justify his

decision to reverse course. Second, the argument ignores that certain of the other defendants who received relief under Attorney General Cornyn's action had also called Dr. Quijano as a witness. *See Buck v. Thaler*, 132 S. Ct. 32 (2011) (Sotomayor, J., dissenting) ("Like Buck, the defendants in both *Blue* and *Alba* called Quijano to the stand."). Third, the argument utterly sidesteps the need to remedy the error of Petitioner's constitutionally-deficient attorney, who elicited this testimony in the first instance.

The Attorney General's decision ensured that Petitioner would not be sentenced in a manner consistent with the five other similarly-situated defendants whose sentences also were tainted by Dr. Quijano's testimony. That decision is at odds with the "trust in the prosecutor" as "the representative of a sovereignty . . whose interest . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Kyles v. Whitley*, 514 U.S. 419, 439 (1995) (ellipses in original) (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)).

B. The Texas Attorney General's Decision to Reverse the Position of his Predecessor Violated the Public Trust in Evenhanded Administration of Justice

The decision of the Attorney General of Texas to renege on his predecessor's position poses special threats to the integrity of the justice system and underscores the impropriety of the Fifth Circuit's denial of a certificate of appealability. Criminal defendants, and particularly capital defendants, have a right to expect that their cases will be treated evenhandedly and consistently. The ideological

predispositions of the Attorney General or the U.S. Attorney on a given case should not dictate the availability of fundamental constitutional protections. In fact, any perception that a change in office leadership was the dispositive factor in a charging or sentencing decision is corrosive to the impartiality on which public confidence in the justice system is based.

The justice system demands that prosecutors uphold the commitments that they make to criminal defendants. Prosecutors are officers of the court, and the representations that prosecutors make carry the authority of the state. *See United States v. Hasting*, 461 U.S. 499, 522 (1983) (explaining that "Government prosecutors" are "officers of the court charged with upholding the law"). It is reasonable to hold prosecutors to those promises when dealing with criminal defendants. As such, courts have vacated and invalidated guilty pleas where they have been elicited based upon false promises. *See, e.g., Santobello v. New York*, 404 U.S. 257, 262 (1971) (concluding "the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made" will be best served by vacating judgment).

That Texas made its decision following a change in the leadership of the Attorney General's Office only worsens the problem. The credibility of prosecutors as participants in the justice system requires a knowledge of and respect for institutional precedent. *See id.* ("The staff lawyers in a prosecutor's office have the burden of 'letting the left hand know what the right hand is doing' *or has done*." (emphasis added)). For example, U.S. Attorney's Offices regularly consult, study, and cite

historical office practice before making charging decisions, negotiating plea agreements, or advancing legal positions in the trial or appellate courts. *See* Memorandum from Eric J. Holder Jr. to All Federal Prosecutors, Department Policy on Charging and Sentencing (May 19, 2010), *available at* https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/holder-memo-charging-sentencing.pdf (last visited Jul. 31, 2016) ("With respect to charging decisions, plea agreements, and advocacy at sentencing, the mechanisms established for obtaining supervisory approval should be designed to ensure, as much as possible . . . district-wide consistency. Supervisory attorneys selected to review exercises of discretion should be skilled, experienced, and thoroughly familiar with Department and district-specific policies, priorities, and practices."); *see also* U.S. Dep't Of Justice, U.S. Attorneys' Manual § 9-27.130 (2014), https://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution#9-27.130 (explaining that one of the purposes of establishing office procedures is "to ensure consistency in the decisions within each office . . . ."). Those precedents help promote uniformity in charging and sentencing decisions, and also help promote accountability in how justice is administered in both federal and state governments.

If prosecutorial decisions are haphazardly cast aside everytime the leadership of a prosecutor's office changes, the public and judiciary will lose confidence in the impartiality of prosecutors. *See Santobello*, 404 U.S. at 262 (explaining that government breach of plea agreement cannot be excused because subsequent prosecutor was

unaware of agreement); Roberta K. Flowers, *What You See Is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors Appearances to the Mind Are of Four Kinds. Things Either Are What They Appear to Be; or They Neither Are, Nor Appear to Be*, 63 Mo. L. Rev. 699, 703, 732 (1998) ("Because the prosecutor's actions affect not only the individual criminal case but also the system as a whole, the prosecutor must be concerned with both the propriety of her actions and the appearance of those actions. . . . As a quasi-judicial officer and a minister of justice, the prosecutor affects public confidence in the legal system.") In cases like this, where "[w]e are provided with no explanation for why the State declined to act consistently with its Attorney General's public announcement with respect to Appellant Buck," *Buck v. Thaler*, 452 F. App'x 423, 433 n.41 (5th Cir. 2011), the public is left to assume that the justice system is arbitrary. As Attorney General Cornyn correctly stated: "The people of Texas want and deserve a system that affords the same fairness to everyone." June 9 Statement.

The integrity of the justice system demands that prosecutors be held to their promises to criminal defendants. To depart from such a promise is indeed extraordinary, and a departure with life or death consequences for a defendant warrants close judicial scrutiny.

C. Texas' Decision Results in Arbitrary and Uneven Justice

Texas' current decision to oppose Petitioner's request for a new sentence is arbitrary because it applies disparate treatment to similarly-situated

defendants. It is, of course, unjust for "virtually identically situated litigants [to be] treated in a needlessly disparate manner. . . ." *Roper v. Weaver*, 550 U.S. 598, 601 (2007). As discussed *supra*, with the exception of this case, in every other case in which Dr. Quijano's prejudicial testimony was offered, the State kept its promise to waive all procedural defenses and conceded that Dr. Quijano's testimony demanded new sentencing hearings.

Texas has claimed that its refusal to abide by its promise is not arbitrary because Petitioner's ineffectiveness claim was foreclosed by state habeas counsel's default of that claim, and because Petitioner's case "present[ed] a strikingly different scenario than that presented in *Saldaño*—Buck himself, not the State offered Dr. Quijano's testimony into evidence." Resp't Dretke's Answer and Mot. for Summ. J. with Br. in Supp. at 17, 21 25, *Buck v. Stephens*, No. 4:04-cv-03965 (S.D. Tex. Sept. 6, 2005) ECF No. 6 (hereinafter, "Respondent's Answer"). Both of these arguments fail.

With respect to default, the Fifth Circuit rejected the argument that the Attorney General's failure to honor its commitment to waive procedural default defenses constituted an "extraordinary circumstance." *Buck v. Stephens*, 623 F. App'x 668, 673-74 (5th Cir. 2015). Such a conclusion cannot be squared with the Fifth Circuit's own statement that this broken promise presented an "odd and factually unusual" circumstance. *Id.* It is unclear why an "odd and factually unusual" action is not extraordinary under the Fifth Circuit's reasoning. Indeed, Attorney General Cornyn's initial acknowledgement that Petitioner had been sentenced in violation of the Constitution and that Texas would therefore not bar

Petitioner's meritorious request for a new sentence on the basis of any procedural default is, itself, extraordinary. If the subsequent reversal of this promise, for specious reasons, does not constitute "extraordinary circumstances," then the standard is too strict to provide any meaning.

Moreover, Petitioner's case is not meaningfully different from those cases in which Texas abided by its prior agreement. "Like Buck, the defendants in both *Blue* and *Alba* called Quijano to the stand." *Buck*, 132 S. Ct. at 37 (Sotomayor, J., dissenting). And contrary to Texas' representation, the prosecutor at Petitioner's sentencing did indeed elicit the same testimony, and returned to it in her closing. Tr. at 260:13-21, ECF No. 5-117. Indeed, because Texas waived its procedural defenses in every other case involving Dr. Quijano's testimony, Petitioner is the only individual in Texas facing execution on the basis of racially-biased expert testimony.

As a consequence, Texas' decision cannot be squared with the prosecutorial duty to seek justice. That duty requires a non-arbitrary application of the law—especially in capital cases. *DeGarmo v. Texas*, 474 U.S. 973, 975 (1985) (Brennan, J., dissenting) ("[W]here death is the consequence, the prosecutor's "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." (internal citations and quotation marks omitted)).

In this case, Texas lacks a legitimate interest in the finality of this judgment. Texas has already determined that cases similarly-situated to *Saldaño* were constitutionally-deficient and that it was

necessary to reverse the finality of these judgments to uphold the Constitution, respect the rule of law, and preserve the public's faith in the criminal justice system. Texas cannot credibly claim an interest in the finality of petitioner's sentence of death where its own Attorney General publicly stated that this sentence violated the Constitution because it permitted the consideration of racially-biased testimony. No "societial interest" can exist in "permitting the criminal process to rest at a point where it ought to never to repose." *Welch v. United States*, 136 S.Ct. 1257, 1266 (2016) (internal quotations omitted).

In sum, the Texas Attorney General's reversal of its prior position was extraordinary. The decision erodes the public perception that prosecutorial decisions are evenhanded and impartial, and accordingly undermines the integrity of the office. This Court should not allow such unjust and unequal results. *See United States v. Chavez*, 416 U.S. 580, 599 (1974) (Douglas, J., concurring in part) (acknowledging "the duty of this Court to nourish and enhance respect for the evenhanded application of the law"); *see also Breed v. Jones*, 421 U.S. 519, 527 (1975) (discussing "our concepts of basic, even-handed fairness." (internal citations and quotation marks omitted)).

CONCLUSION

This Court should reverse the Fifth Circuit's denial of Petitioner's petition for a Certificate of Appealability.

Respectfully submitted,

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August 4, 2016

APPENDIX

APPENDIX OF AMICI CURIAE

William Broaddus: Attorney General of Virginia (1985-1986); Assistant Attorney General, Virginia (1970-1973); County Attorney, Henrico, Virginia (1973-1982); Chief Deputy Attorney General, Virginia (1982-1985)

A. Bates Butler III: United States Attorney, District of Arizona (1980-1981); First Assistant United States Attorney, District of Arizona (1977-1980); Deputy Pima County, Arizona Attorney, (1970-1977)

W. J. Michael Cody: Attorney General of Tennessee (1984-1988); United States Attorney, Western District of Tennessee (1977-1981)

Tim Cole: Assistant District Attorney, 271st District of Texas (2010-2014); District Attorney, 97th District of Texas (1993-2006)

W. Thomas Dillard: United States Attorney, Northern District of Florida (1983-1987); United States Attorney, Eastern District of Tennessee (1981); Assistant United States Attorney, Eastern District of Tennessee (1967-1976 and 1978-1983); United States Magistrate for the Eastern District of Tennessee (1976-1978)

Mark Earley: Attorney General of Virginia (1998-2001); Virginia State Senator (1988-1998); CEO/President, Prison Fellowship Ministries (2002-2010)

Rufus Edmisten: Attorney General of North Carolina (1974-1984)

John Gallo: Assistant United States Attorney, Northern District of Illinois (1989-1996)

Linda S. Hood Geffin: Assistant District Attorney, Harris County, Texas (Second chair prosecutor in *State v. Buck*) (1990-2000)

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Scott Harshbarger: Attorney General of Massachusetts (1991-1999); District Attorney, Middlesex County, Massachusetts (1983-1991)

Glenn Ivey: State's Attorney, Prince George's County, Maryland (2003-2011); Assistant United States Attorney for the District of Columbia (1990-1994)

Grant Jones: District Attorney, Nueces, Kleberg and Kenedy Counties, Texas (1983-1991)

Gerald Kogan: Chief Justice, Supreme Court of Florida (1996-1998); Associate Justice (1987-1996); Judge, Eleventh Judicial Circuit of Florida (1980-1987); Assistant State Attorney (including Chief Prosecutor, Homicide and Capital Crimes Division), Dade County, Florida (1960-1967)

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Timothy Lewis: Judge, United States Court of Appeals for the Third Circuit (1992-1999); Judge, United States District Court for the Western District of Pennsylvania (1991- 1992); Assistant United States Attorney, Western District of Pennsylvania (1983-1991); Assistant District Attorney, Allegheny County, Pennsylvania (1980-1983)

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Mark White: Governor of Texas (1983-1987); Attorney General of Texas (1979-1983)

Alex Whiting: Assistant United States Attorney, District of Massachusetts (1995-2002); Trial Attorney, United States Department of Justice Civil Rights Division (1991-1995); Special Assistant United States Attorney (1992)

John T. Zach: Assistant United States Attorney, Southern District of New York (2006-2015)